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DIGITAL DEMOCRACY: *ANDERSON V. BELL* & THE EXPANSION OF ELECTRONIC SIGNATURES IN ELECTION LAW

Barry G. Stratford*

*Technology is dominated by two types of people: those who understand what they do not manage and those who manage what they do not understand.*¹

I. INTRODUCTION

The law has long recognized electronic signatures as legally effective where hand-signed signatures are required. As early as 1869, the New Hampshire Supreme Court acknowledged the validity of a contract accepted by telegraph.² The court made observations about the application of technology to law that proves insightful even today:

[I]t makes no difference whether [the telegraph] operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.³

Over the past decade, electronic signatures⁴ have become increasingly accepted under the laws of most jurisdictions. For example, in 2000, the United States Congress enacted legislation ensuring the validity of transactions and

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¹ ARCHIBALD PUTT, PUTT'S LAW AND THE SUCCESSFUL TECHNOCRAT: HOW TO WIN IN THE INFORMATION AGE 7 (2006).

² Howley v. Whipple, 48 N.H. 487, 488 (1869).

³ *Id.*

⁴ For a general description of varying types of electronic signatures, which includes digital signatures, public key cryptography, biometric devices, and smart cards, see WARWICK FORD & MICHAEL S. BAUM, SECURE ELECTRONIC COMMERCE (1997); SIMSON GARFINKEL & GENE SPAFFORD, WEB SECURITY AND COMMERCE 187-208 (1997); JANE K. WINN & BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE § 1.04[E] (4th ed. 2009).

contracts entered into through electronic signatures.⁵ Since that time, forty-seven states have also passed legislation making electronic signatures a legitimate and streamlined aspect of the law.⁶

On June 22, 2010, the Utah Supreme Court dramatically expanded the recognition and validity of electronic signatures in *Anderson v. Bell*.⁷ The court held electronic signatures are legally effective and enforceable when qualifying a candidate for the ballot under Utah's Election Code.⁸ Utah has a tradition of treating electronic signatures progressively in the law; for example, it was the first state in the nation to enact legislation designed to facilitate electronic transactions⁹ between parties with no prior business relationship.¹⁰ Furthering this tradition, the court's decision in *Anderson* placed Utah in the forefront of the merger between technology, law, and democratic governance.

The decision has been hailed as "a huge step forward in recognizing the legal efficacy of electronic signatures that may reverberate around the nation."¹¹ The incorporation of electronic signatures in election law would likely have a positive impact on access and involvement in democratic participation, especially with citizen-led initiatives and referenda.

Part II of this Note examines the laws surrounding electronic signatures, including the federal Electronic Signatures in Global and National Commerce Act (E-SIGN)¹² and Utah's Uniform Electronic Transactions Act (the UETA).¹³ This section also discusses the novel application of electronic signatures in the area of election law in the Utah Supreme Court's *Anderson* decision.

Part III of this Note argues that the expansion of electronic signatures in election law is a logical extension of E-SIGN and the UETA. Specifically, this Note argues that the Utah Supreme Court's application of electronic signatures in qualifying a candidate for the ballot was proper. Part IV further advocates that lawmakers *should* incorporate the use of electronic signatures into the election

⁵ See *infra* text accompanying notes 17–33.

⁶ See *infra* text accompanying notes 33–44.

⁷ 234 P.3d 1147 (Utah 2010).

⁸ *Id.* at 1156.

⁹ At that time, the technology focused specifically on the use of "digital signatures" rather than the broader use of an electronic signature discussed in this article. A digital signature refers to the "specific authentication technology using asymmetric cryptography." Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under the Federal E-Sign Legislation and the UETA*, 56 BUS. LAW. 293, 295 (2000).

¹⁰ UTAH CODE ANN. §§ 46-3-201 to -504 (LexisNexis 1998) (repealed 2006).

¹¹ David K. Isom, *Electronic Signatures Come of Age: From Elections to Commerce and Beyond*, INFO. L. GROUP (June 23, 2010), <http://www.infolawgroup.com/2010/06/articles/esignatures-1/electronic-signatures-come-of-age-from-elections-to-commerce-and-beyond/>.

¹² 15 U.S.C. § 7001 (2006).

¹³ UTAH CODE ANN. §§ 46-4-101 to -503 (LexisNexis 2009); see also *Uniform Electronic Transactions Act*, NAT'L CONF. ST. LEGISLATURES [hereinafter UETA], <http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/UniformElectronicTransactionsActs/tabid/13484/Default.aspx> (last visited Jan. 20, 2012).

code wherever feasible. This section will also discuss the implications resulting from the normalization of electronic signatures in election law, including an argument that such normalizations will increase citizen participation in our nation's long-revered democratic processes. In particular, initiative and referendum petitions would likely see increased use throughout the states. Part V concludes.

II. FOUNDATIONS OF ELECTRONIC SIGNATURES IN THE LAW

While the law has long incorporated electronic signatures as legally effective where hand-signed signatures are required,¹⁴ some commentators believe the electronic signature statutes of the last decade are “rare examples of law leading technology.”¹⁵ Ever since the passage of federal and state uniform acts recognizing the validity of electronic signatures, the “technology has been catching up to the law.”¹⁶ To give context to the court's decision in *Anderson*, this section examines both the federal E-SIGN and Utah's version, the UETA.

A. *The Electronic Signatures in Global and National Commerce Act*

On June 30, 2000, President Clinton signed E-SIGN into law using a smart card that allowed him to sign the bill through the use of an electronic signature.¹⁷ The legislation established the validity of electronic signatures for interstate and international commerce where “a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form”¹⁸ The act was designed to “place[] electronic records and signatures on a legal par with their paper and ink counterparts.”¹⁹

E-SIGN defines an “electronic signature” as “an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”²⁰ Therefore, a digital signature using public key infrastructure technology, a typed name, or a PIN would qualify as a valid signature under the law.²¹ E-SIGN further specified that electronic signatures are voluntary, as the Act does not “require any person to agree to use or accept electronic records or electronic signatures.”²² To that effect,

¹⁴ See, e.g., *Howley v. Whipple*, 48 N.H. 487 (1869) (recognizing electronic signatures in the context of the telegraph).

¹⁵ Isom, *supra* note 11.

¹⁶ *Id.*

¹⁷ Dave Wreski, *Clinton to E-SIGN Digital Signature Law*, LINUXSECURITY.COM, <http://www.linuxsecurity.com/content/view/107946/169/> (last visited Jan. 20, 2012).

¹⁸ 15 U.S.C. § 7001(a)(1) (2006).

¹⁹ See Wittie & Winn, *supra* note 9, at 297.

²⁰ 15 U.S.C. § 7006(5) (2006).

²¹ See Susan H. Siegfried, *The E-Commerce Revolution: E-SIGN and UETA* (June 20, 2006) (unpublished manuscript), available at <http://www.simply-easier-acord-forms.com/support-files/susansiegfried.pdf> [sic] (last visited Jan. 20, 2012).

²² 15 U.S.C. § 7001(b)(2).

the legislation requires that consumers agree to the transactions that use electronic signatures: “consumer disclosure” must be used to show that the consumer “consent[s] electronically . . . in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.”²³

The legislation also provides for the accuracy and availability of the electronic record that is created.²⁴ Once a user enters an electronic signature, E-SIGN specifies that for any “statute, regulation, or other rule of law requir[ing]”²⁵ retention of a document, the requirement can be met through “retaining an electronic record” rather than a paper record.²⁶ All parties must be given access to the electronic record with the electronic signature.²⁷ The record must be in a format that is both accurate and accessible.²⁸

Beyond these basic requirements, the legislation does not specify or endorse any particular type of technology, allowing for continual software and hardware development.²⁹ This also provides greater flexibility and market competition for individuals, companies, and agencies to choose the technology that best fits their needs.³⁰

E-SIGN also places some limits on electronic signatures. It excludes application to wills, codicils, testamentary trusts, adoptions, divorces, other matters of family law, or most sections of the Uniform Commercial Code.³¹ It also does not apply to court orders, notices, official court documents, notice of the cancellation of utilities, default, acceleration, or to foreclosures.³²

Thus, E-SIGN establishes the legal efficacy of electronic signatures in federal law and provides additional validation for the use of electronic signatures in transactions. It also serves as the federal counterpart to state laws recognizing electronic signatures.

²³ *Id.* § 7001(c)(1)(C)(ii).

²⁴ *Id.* § 7001.

²⁵ *Id.* § 7001(c)(1).

²⁶ *Id.* § 7001(d)(1).

²⁷ *Id.* § 7001(d)(1)(B).

²⁸ *Id.* § 7001(d)(1)(B).

²⁹ *Guidance on Implementing the Electronic Signatures in Global National Commerce Act (E-SIGN)*, NAT’L INST. OF STANDARDS & TECH. 3–4, <http://csrc.nist.gov/drivers/documents/esign-guidance.pdf> (last visited Jan. 22, 2012); see Siegfried, *supra* note 21.

³⁰ See generally Siegfried, *supra* note 21.

³¹ 15 U.S.C. § 7003(a). Specifically, the statute does not apply to sections 1-107, 1-206, and Articles 2 and 2A of the Uniform Commercial Code. *Id.* § 7003(a)(3).

³² *Id.* § 7003(b).

B. The Uniform Electronic Transactions Act in Utah

The UETA was the result of a proposal by the National Conference of Commissioners on Uniform State Laws.³³ Like E-SIGN, the UETA provides “a legal framework for the use of electronic signatures and records in government or business transactions.”³⁴ Forty-seven states, the District of Columbia, Puerto Rico, and the Virgin Islands have all adopted a uniform or modified version of the Act.³⁵ While Illinois, New York, and Washington are the only states that have yet to adopt some version of the UETA, all three states have passed other statutes validating the use of electronic signatures in certain situations.³⁶

States that have adopted the UETA have the authority to “modify, limit or supersede some E-SIGN provisions, including its consumer protection provisions.”³⁷ This can be done so long as the statute does not favor a specific technology and, if adopted after E-SIGN, where a state explicitly indicates an intention to override the E-SIGN Act.³⁸ Otherwise, E-SIGN will “govern[] in the absence of a state law or where states have made modifications to the UETA that are inconsistent with E-SIGN.”³⁹

In 2000, the Utah Legislature enacted its own version of the UETA.⁴⁰ Like the provisions of E-SIGN, Utah’s UETA provides for a number of definitions important to electronic signatures and electronic records.⁴¹ Additionally, the Utah UETA specifies formatting requirements, record and check retention rules, rules permitting electronic originals, rules on notarization, and rules for electronic agents.⁴² The Utah UETA specifically excludes electronic signatures from wills, codicils, testamentary trusts, and Articles 3 through 9 of the Uniform Commercial Code.⁴³ Additionally, it grants administrative agencies the authority to determine when and if government documents will be filed electronically and permits regulators to establish record retention requirements for mandatory records for

³³ See UETA, *supra* note 13.

³⁴ *Id.*

³⁵ *Id.*; see also UNIF. ELECT. TRANSACTIONS ACT §§ 1–21 (West 2010). For the original draft version and commentary, see Nat’l Conference of Comm’rs of Unif. State Laws, *Uniform Electronic Transactions Act* (1999) [hereinafter NCCUSL], available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.htm> (last visited Jan. 21, 2012).

³⁶ UETA, *supra* note 13; Electronic Commerce Security Act, 5 ILL. COMP. STAT. ANN. 175/5-105 (West 2005); Electronic Signature and Records Act, N.Y. STATE TECH. LAW § 301 (McKinney 2003 & Supp. 2012); Electronic Authentication Act, WASH. REV. CODE ANN. § 19.34.010 (West 1999 & Supp. 2012).

³⁷ See UETA, *supra* note 13.

³⁸ See generally Wittie & Winn, *supra* note 9, at 324.

³⁹ See UETA, *supra* note 13.

⁴⁰ UTAH CODE ANN. §§ 46-4-101 to -503 (LexisNexis 2009).

⁴¹ *Id.* § 46-4-102.

⁴² *Id.* §§ 46-4-202 to -501.

⁴³ *Id.* § 46-4-103.

government inspection, review, or audit.⁴⁴ Both E-SIGN and the UETA provide the context and validity for the use of electronic signatures that underlie the Utah Supreme Court's decision in *Anderson v. Bell*.

C. *Anderson v. Bell*

In 2010, Farley Anderson, a Utah resident, “entrepreneur, inventor, author, publisher, teacher, lecturer, husband[,] and father of 11” began his independent campaign to become the governor of Utah.⁴⁵ Under Utah's Election Code, a candidate not affiliated with a registered political party must collect the signatures of 1,000 registered voters to run for governor.⁴⁶ Mr. Anderson collected more than the 1,000 required signatures in order to qualify his candidacy for governor of Utah on the 2010 election ballot.⁴⁷ However, not all of the signatures were hand-signed, as many were gathered electronically through a campaign website.⁴⁸

In compliance with the procedures outlined in the Utah Election Code, Mr. Anderson submitted the signatures to county clerks for verification that each signer was a registered voter and had not signed the petition for any other unaffiliated candidate.⁴⁹ Of the signatures submitted, clerks in seven counties certified 1,055 signatures as valid.⁵⁰ Armed with the requisite signatures and a completed certificate of nomination, Mr. Anderson submitted his petition of candidacy on March 19, 2010, to the Utah Lieutenant Governor's Office.⁵¹

Lieutenant Governor Greg Bell took the position that electronic signatures do not constitute a valid signature under the Utah Election Code and excised the electronic signatures from Mr. Anderson's nomination.⁵² Subsequently, Bell rejected Mr. Anderson's candidacy for failing to obtain the required 1,000 signatures.⁵³ Mr. Anderson filed a petition for extraordinary writ to the Utah Supreme Court arguing, among other things, that electronic signatures plainly satisfy the requirements of the Utah Election Code.⁵⁴ Furthermore, the petition alleged that Bell overstepped his authority in defining what constitutes a signature subject to removal from a certificate of nomination.⁵⁵

⁴⁴ *Id.* §§ 46-4-501 to -503.

⁴⁵ *Utah Voter Information Pamphlet*, VOTE.UTAH.GOV, 12, <http://www.scribd.com/doc/41938055/District-4> (last visited Jan. 21, 2012).

⁴⁶ UTAH CODE ANN. § 20A-9-502 (LexisNexis 2009).

⁴⁷ *Anderson v. Bell*, 234 P.3d 1147 (Utah 2010).

⁴⁸ *Id.* at 1148.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1149. The court declined to address Mr. Anderson's other claims given their “ultimate holding that an electronic signature satisfies the signature mandate imposed on unaffiliated candidates.” *Id.*

⁵⁵ *Id.*

The court distilled the petition as asking “a single, distinctive question: what is a ‘signature’ under [Utah’s Election Code]? Or more specifically, does an electronic signature qualify as a valid signature under this statutory subsection?”⁵⁶ From the outset, the court emphasized that the statutory language requires the court to construe the framework covering unaffiliated candidates to give them “every reasonable opportunity to make their candidacy effective.”⁵⁷

The court noted that the Legislature had never defined the relevant terms of “signature,” “signed,” or “completed” in the Utah Election Code.⁵⁸ The court did recognize, however, that there were “strong statutory indicators” elsewhere in the Utah Code that a signature was not exclusive to a name or mark as *written* by a person or at a person’s direction.⁵⁹ Specifically, section 68-3-12—which outlines the rules of construction as to words and phrases of the entire Utah Code—directs courts to observe these definitions unless they would be “inconsistent with the manifest intent of the Legislature” or “repugnant to the context of the statute.”⁶⁰

Moreover, the court looked to section 68-3-12 in determining the definition of the term “signature.”⁶¹ Under this section, this definition includes a “name, mark, or sign written with the intent to authenticate any instrument or writing.”⁶² The Legislature defined “writing” to include “information stored in an electronic or other medium if the information is retrievable in a perceivable format.”⁶³ Taking these definitions together, the court determined that electronic signatures were explicitly contemplated by the Legislature under section 68-3-12.⁶⁴

Central to the court’s decision was the recognition that the definitions of “signature” and “writing” appeared to be far less concerned with the form of the signature than they are concerned with the intent of the signer.⁶⁵ This emphasis on intent mirrors the importance that Utah courts have acknowledged in common law.⁶⁶ The court also noted several secondary sources that provided indicia of intent.⁶⁷

⁵⁶ *Id.* at 1150.

⁵⁷ *Id.* (emphasis omitted) (quoting UTAH CODE ANN. § 20A-9-501(3) (2007)).

⁵⁸ *Id.* The Utah Election Code provides definitions, but does not include those terms. See UTAH CODE ANN. § 20A-1-102 (LexisNexis 2009).

⁵⁹ *Id.* at 1151–52.

⁶⁰ UTAH CODE ANN. § 68-3-12(1)(a) (LexisNexis 2008).

⁶¹ *Anderson*, 234 P.3d at 1151–52.

⁶² UTAH CODE ANN. § 68-3-12.5(24).

⁶³ *Id.* § 68-3-12.5(33).

⁶⁴ *Anderson*, 234 P.3d at 1152.

⁶⁵ *Id.*

⁶⁶ See, e.g., *State v. Montague*, 671 P.2d 187, 191 (Utah 1983) (finding an imprinted name of a judge made by a court clerk a “signature”); *Salt Lake City v. Hanson*, 425 P.2d 773, 774 (Utah 1967) (discussing that it is the intent, rather than the form, of the act that is important).

⁶⁷ See, e.g., 17A AM. JUR. *Contracts* § 176 (2011) (stating that “a signature is whatever mark, symbol, or device one may choose to employ to represent oneself, and may include fingerprints. . . . ‘Electronic’ signatures are valid, and legislation has been enacted specifically to authorize them” (footnotes omitted)); BLACK’S LAW DICTIONARY 1415 (8th

The court then turned to Utah's version of the Uniform Electronic Transactions Act and its implication on the Election Code.⁶⁸ The UETA defines an electronic signature as "an electronic sound, symbol, or process . . . executed or adopted by a person with the intent to sign the record."⁶⁹ Thus, the court reasoned that once again, the statutory language indicates that the intent of the signer, rather than the form, was the Legislature's emphasis.⁷⁰

The UETA is explicit about the use of electronic signatures: "[i]f a law requires a signature, an electronic signature satisfies the law."⁷¹ Mr. Anderson's argument relied on the proposition that this statute applies equally to other areas of the Utah Code, including the Election Code.⁷² When the UETA was enacted, the Utah Legislature enumerated a number of transactions that were excluded from the UETA.⁷³ It did not, however, generally exclude the Election Code. Nor did it specifically exclude campaigning, qualifying a candidate for the ballot, qualifying a ballot proposition, the formation of a political party, or anything else regarding the topic of elections. While observing that the omission does not qualify as a "legislative endorsement," the court found that the lack of a specific exclusion for the Election Code was noteworthy.⁷⁴ The court concluded that UETA statutory governs the use of "electronic signatures where its other requirements can be satisfied."⁷⁵

The court's analysis then shifted to refuting the arguments advanced by Lieutenant Governor Bell. Though Mr. Anderson's argument seemed to be a logical interpretation of the statute, the lieutenant governor disputed this reading. Lieutenant Governor Bell argued that certain subsections of the UETA were designed to grant state agencies broad authority to choose whether or not to conduct state business through electronic means and that forcing his office to accept Mr. Anderson's electronic signatures would violate the plain language of those subsections.⁷⁶ This argument relies on the following provision:

A state governmental agency may, by following the procedures and requirements of Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules that: (a) identify specific transactions that the agency is willing to conduct by electronic means; (b) identify specific transactions that the agency will never conduct by electronic means⁷⁷

ed. 2004) (defining a signature as "[a]ny name, mark, or writing used with the intention of authenticating a document").

⁶⁸ *Anderson*, 234 P.3d at 1152.

⁶⁹ UTAH CODE ANN. § 46-4-102(8) (LexisNexis 2005).

⁷⁰ *Anderson*, 234 P.3d at 1152.

⁷¹ UTAH CODE ANN. § 46-4-201(4).

⁷² *Anderson*, 234 P.3d at 1148.

⁷³ UTAH CODE ANN. § 46-4-202.

⁷⁴ *Anderson*, 234 P.3d at 1153.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ UTAH CODE ANN. § 46-4-501(1)(b) (LexisNexis 2009).

The court rejected Lieutenant Governor Bell's contention that allowing Mr. Anderson's candidacy would "force his office, in contravention of the plain language of [the Utah Administrative Rulemaking Act], to permit the use of electronic signatures."⁷⁸

The court noted that Lieutenant Governor Bell had "done nothing to promulgate rules for electronic records" under the rulemaking procedures required by Title 63G.⁷⁹ As the court recognized, holding otherwise would disregard the rulemaking component of the statute.⁸⁰ Such a reading would establish precedent that anytime a state agency had not promulgated rules regarding electronic signatures, the agency, by default, would not conduct business through electronic means. The court emphasized that the rulemaking requirement was "critical" to prevent "informal decisions" made on a case-by-case basis.⁸¹

The court acknowledged that Lieutenant Governor Bell's second argument—claiming subsection 46-4-501(4), which controls the creation and retention of electronic records and conversion of written records by governmental agencies, as expressly allowing his office to refuse Mr. Anderson's certificate of nomination—was "plausible," if read in isolation.⁸² Subsection 4 specifies that "nothing in this chapter requires any state governmental agency to: (a) conduct transactions by electronic means; or (b) use or permit the use of electronic records or electronic signatures."⁸³

Nonetheless, the court rejected this reading of the statute. The court found that Lieutenant Governor Bell's contention "loses its persuasive effect" when "harmoniz[ing] this subsection with the rest of section 46-4-501, the remainder of the UETA, [the Utah Code's rules of statutory construction], and the Election Code."⁸⁴ To construe subsection 46-4-501(4) in the manner that Bell advanced would expressly contradict the UETA for several reasons.⁸⁵ First, the UETA expressly permits any law requiring a signature to be satisfied by an electronic signature.⁸⁶ Second, the UETA mandates that an electronic signature "may not be denied legal effect or enforceability solely because it is in electronic form."⁸⁷

The court also noted that the UETA requires the Act "be construed and applied: (1) to facilitate electronic transactions" and "(2) to be consistent with reasonable practices concerning electronic transactions and with the continued

⁷⁸ *Anderson*, 234 P.3d at 1154.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ UTAH CODE ANN. § 46-4-501(4) (LexisNexis 2009).

⁸⁴ *Anderson*, 234 P.3d at 1154 (citing *Sill v. Hart*, 162 P.3d 1099, 1102 (Utah 2007)) (stating that part of the court's attempt to determine a statute's plain language is to construe the statute at issue "with every other part or section so as to produce a harmonious whole").

⁸⁵ *Id.* at 1154–55.

⁸⁶ UTAH CODE ANN. § 46-4-201(4).

⁸⁷ *Id.* § 46-4-201(1).

expansion of those practices.”⁸⁸ A “transaction” is “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.”⁸⁹

Lieutenant Governor Bell argued that Mr. Anderson’s method of acquiring signatures did not qualify as a transaction as defined under the UETA.⁹⁰ The court recognized, however, that Lieutenant Governor Bell’s position accomplishes just the opposite, “curb[ing] electronic transactions rather than facilitat[ing] them.”⁹¹ Beyond the narrow exceptions enumerated by the Utah Legislature, the court found that the UETA, by implication, is not excluded in its applications from a range of transactions.⁹²

The lieutenant governor also argued that as the chief election officer for Utah, he is a “party” to the signing transaction and must agree to the use of electronic signatures.⁹³ This argument rests on the UETA’s application “only to transactions between parties each of which has agreed to conduct transactions by electronic means.”⁹⁴ The court was not persuaded, noting, “the would-be candidate circulates a petition for nomination *to registered voters*.”⁹⁵ Because a petition for nomination is submitted to county clerks for verification only after the petition is “completed by” 1,000 registered voters,⁹⁶ the court read the term “completed” to mean that the “transaction” had already closed.⁹⁷

The UETA defines a “transaction” as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.”⁹⁸ The court reasoned that “treating the transaction as between the circulating nominee and the signer makes the most logical sense; it is an authentication that the signee supports the circulator’s bid to have his name on the ballot as a candidate for statewide office.”⁹⁹ Therefore, the court rejected the argument that including the lieutenant governor as a party would impact the transaction or the authentication of a signer’s support.¹⁰⁰

The court then took time to address the lieutenant governor’s argument that electronic signatures are more susceptible to fraud and should not be given the level of credence that paper signatures would be. The court noted:

⁸⁸ *Id.* § 46-4-106.

⁸⁹ *Id.*

⁹⁰ *Anderson*, 234 P.3d at 1155.

⁹¹ *Id.* at 1154–55.

⁹² *Id.* at 1155.

⁹³ *Id.*

⁹⁴ UTAH CODE ANN. § 46-4-105(2)(a).

⁹⁵ *Anderson*, 234 P.3d at 1155 (emphasis added).

⁹⁶ UTAH CODE ANN. § 20A-9-502(2)(a) (LexisNexis Supp. 2009).

⁹⁷ *Anderson*, 234 P.3d at 1155.

⁹⁸ UTAH CODE ANN. § 46-4-102(16) (LexisNexis 2005).

⁹⁹ *Anderson*, 234 P.3d at 1155.

¹⁰⁰ *Id.*

The Lt. Governor . . . contends that electronic signatures attached to a certificate of nomination lack “apparent authority” as genuine signatures. This position is based on a theory that a holographic signature is self-authenticating because the reviewing party may merely look at the signature and see that someone put pen to paper to sign [his or her] name. In contrast, an electronic signature lacks apparent authority, because it appears as a typed list of names. . . . We are unpersuaded that an electronic signature presents special concerns regarding candidate fraud; a candidate could as easily handwrite or type fraudulent names onto a certificate of nomination.¹⁰¹

The court also recognized that “electronic signatures may be a better deterrent to candidate fraud because an electronic signature incorporates readily verifiable personal, but not-public, information.”¹⁰² As an example, the court noted “the signers of Mr. Anderson’s petition apparently had to enter a security code that corresponds to the last four digits of their driver’s license number before their signature would be counted.”¹⁰³

The court concluded by holding that Lieutenant Governor Bell exceeded his authority as Utah’s chief election officer when he “excised the electronic signatures attached to Mr. Anderson’s certificate of nomination.”¹⁰⁴ The court granted Mr. Anderson his writ of extraordinary relief and instructed the lieutenant governor to recount the signatures submitted by Mr. Anderson.¹⁰⁵ Subsequently, Mr. Anderson was placed on the 2010 ballot as a candidate for Utah Governor, losing the election with 11,842 votes, or only 1.99%.¹⁰⁶

In 2011, the Utah Legislature viscerally reacted to the Utah Supreme Court’s holding in *Anderson*. The Utah Legislature amended the Election Code to prohibit electronic signatures.¹⁰⁷ Additionally, the Legislature specified that holographic signatures alone are sufficient for Utah election purposes.¹⁰⁸ These changes not only abolished the holding in *Anderson* but also eliminated any chance that electronic signatures could be used for the other election procedures, such as organizing a political party or putting forward citizen-led initiatives or referenda.

¹⁰¹ *Id.* at 1155 n.7.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1156.

¹⁰⁵ *Id.*

¹⁰⁶ *Utah Election Results: Governor/Lt Governor*, UTAH.GOV, <http://electionresults.utah.gov/xmlData/300080.html> (last visited Jan. 24, 2012).

¹⁰⁷ UTAH CODE ANN. § 20A-1-306 (LexisNexis Supp. 2011); *see also* S.B. 165 Second Substitute, 2011 Leg., Gen. Sess. (Utah 2011), *available at* <http://www.le.utah.gov/~2011/bills/sbillenr/sb0165.pdf>.

¹⁰⁸ *See* UTAH CODE ANN. § 20A-7-101(18) (LexisNexis Supp. 2011).

D. Utah Should Incorporate Electronic Signatures into the Election Code

For reasons discussed below, the Utah Legislature should reconsider its reactionary measures undercutting the *Anderson* decision and once again make Utah a leader in embracing the legitimate and logical use of electronic signatures in the law. Through *Anderson*, Utah became the first state to recognize the use of electronic “transactions” in the context of election law by allowing electronic signatures to qualify Mr. Anderson for the ballot.¹⁰⁹ Reading Utah’s UETA as permitting and encouraging electronic signatures outside of traditional business transactions is novel.¹¹⁰ The *Anderson* decision should serve as the basis for a broader trend among the states in recognizing the validity of electronic signatures in election law where a signer would otherwise physically handle a piece of paper and sign his or her name with a pen.

III. THE LOGICAL EXPANSION OF ELECTRONIC SIGNATURES IN ELECTION LAW

The Utah Supreme Court’s reasoning in *Anderson* is sound. The UETA “applies to electronic records and electronic signatures relating to a transaction.”¹¹¹ The language stating that where the law “requires a signature, an electronic signature satisfies the law” could not be more straightforward.¹¹² The UETA dictates that it “be construed and applied: (1) to facilitate electronic transactions” and “(2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.”¹¹³

Thus, when applied to various election law contexts—such as qualifying independent candidates for the ballot, petitions to organize and register political parties, and qualifying ballot propositions such as recalls, initiatives, and referenda—a legitimate “transaction” between petitioners and signatories is formed. In all of these situations, the signing and submitting electronic signatures to the government for authentication constitutes a completed “transaction” because it is “an action . . . between two or more persons relating to the conduct of . . . governmental affairs.”¹¹⁴

States should encourage their regulatory agencies and governmental departments to use electronic signatures and documents where feasible. Many areas of the law could benefit from the convenience and cost savings associated with using electronic signatures and electronic records rather than their paper counterparts. These benefits include saving time through the elimination of

¹⁰⁹ See *supra* Part II.C.

¹¹⁰ Isom, *supra* note 11.

¹¹¹ UTAH CODE ANN. § 46-4-103(1) (LexisNexis Supp. 2009).

¹¹² *Id.* § 46-4-201(4).

¹¹³ *Id.* § 46-4-106.

¹¹⁴ *Id.* § 46-4-102(16).

signing, scanning, faxing, and mailing.¹¹⁵ Additionally, electronic signatures and records reduce waiting time where a transaction can be completed in seconds.¹¹⁶ Electronic signatures also reduce the costs of paper, ink, and postage.¹¹⁷ Additionally, all parties immediately receive a copy of the transaction, making it easier to file and refer to later.¹¹⁸ Additionally, many electronic signature services include archiving ability to store the documents in one easily accessible location.¹¹⁹ Finally, electronic signatures allow for digital encryptions that provide an increased level of security against fraud.¹²⁰

One expert believes that the court's analysis in *Anderson* will persuade others to embrace electronic signatures on a broader scale, noting, "companies and individuals have been slow to implement the available . . . legislation aimed at encouraging and validating electronic commerce and electronic signatures."¹²¹ Given the advancements of technology and validation evidenced by *Anderson*, states that have adopted the UETA should add language strongly encouraging or requiring agencies to use electronic signatures and electronic records. Congress and the president should encourage the same for federal agencies.

The use of electronic signatures can find particular application to the Election Code. Such a reading is consistent with the UETA's purpose of facilitating electronic transactions and encouraging technology developments relating to electronic signatures.¹²² The validity of using an electronic signature to sign a petition as a "transaction" between the government and its citizenry to recall a wayward politician should be no less legitimate than when a "transaction" for a major purchase with a credit card or when electronically committing to a million-dollar contract. Other states should embrace their roles as "laboratories of democracy" and follow Utah's lead in recognizing that electronic signatures are a valid "transaction" within the context of election law.¹²³

¹¹⁵ See Alyssa Gregory, *How an Electronic Signature Service Can Save You Time and Money*, SITEPOINT (June 18, 2009), <http://www.sitepoint.com/electronic-signature-services>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Isom, *supra* note 11.

¹²² UTAH CODE ANN. § 46-4-106 (LexisNexis 2011); see also NCCUSL, *supra* note 35 (noting "[t]he scope of this Act provides coverage which sets forth a clear framework for covered transactions, and also avoids unwarranted surprises for unsophisticated parties dealing in this relatively new media. The clarity and certainty of the scope of the Act have been obtained while still providing a solid legal framework that allows for the continued development of innovative technology to facilitate electronic transactions.").

¹²³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing states as laboratories of democracy).

One commentator criticized the *Anderson* decision for creating unintended consequences and “a Pandora’s box of election law issues.”¹²⁴ But legislators can easily review their state’s election code to ensure that there is a fair and orderly process to accommodate independent candidates capable of creating web-based campaigns validated entirely by electronic signatures.

Nor is fraud a realistic concern.¹²⁵ A candidate who produces a typed list of fraudulent names of electronic signatures could just as easily hand-write fraudulent names onto a petition or certificate of nomination. In fact, electronic signatures may be a better deterrent to this type of election fraud. The *Anderson* opinion provides such an example: signers were prompted to enter a security code corresponding to the last four digits of their driver’s license number before their signature would be included in the petition.¹²⁶

These considerations are not legitimate excuses to slow the inevitable acceptance of technology in the law, particularly in the context of election law. Legislatures should avoid any confusion by preempting judicial recognition of the validity of electronic signatures and conform their Election Codes to their state’s UETA. Doing so would prevent costly litigation and preserve state resources.

The logical inferences of the court’s holding in *Anderson* would permit the use of an electronic signature into other areas of the Election Code requiring a signature. There is no compelling reason that an electronic signature should be any less valid when qualifying a candidate for the ballot than for signing a petition to organize and register a political party or to qualify a citizen-driven referendum or initiative for the ballot. Other states should recognize that a UETA “transaction” applies in the context of election law.

IV. EXPANDING ELECTRONIC SIGNATURES IN ELECTION LAW WOULD LEAD TO GREATER VOTER PARTICIPATION AND DISCOURSE

By following the Utah Supreme Court’s lead, other states would benefit from increased citizen access to elections and self-governance, particularly involving the formation of political parties, initiatives, and referenda. As the American Civil Liberty Union of Utah noted, the *Anderson* decision has “the potential to significantly increase the ability of independent candidates to access the general

¹²⁴ Thomas O’Toole, *Utah E-Signatures Ruling Could Have Broad Reach*, BLOOMBERG BNA: E-COMMERCE & TECH LAW BLOG (June 23, 2010), <http://www.bna.com/utah-esignatures-ruling-b12884906829/>.

¹²⁵ The concerns for fraud in elections where votes are cast anonymously, *see, e.g.*, Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711 (2005) (discussing the problems of security and transparency regarding direct recording electronic devices), Bryan Mercurio, *Democracy in Decline: Can Internet Voting Save the Electoral Process?*, 2 *MARSHALL J. COMPUTER & INFO. L.* 409 (2004) (presenting an overview of online voting and problems of reliability and accuracy of Internet voting), are beyond the scope of this Note as the use of an electronic signature requires the disclosure of an individual’s identity for verification purposes.

¹²⁶ *See Anderson v. Bell*, 234 P.3d 1147, 1155 n.7 (Utah 2010).

election ballot, and thus to increase the opportunity for minority viewpoints in Utah to be heard and considered in election years.”¹²⁷ The implications extend beyond minority viewpoints, however, as a majority of voters may be inclined to pass an initiative or referendum.¹²⁸

Internet access and usage has exploded in the past decade.¹²⁹ In 2000, 46% of adults used the Internet compared with 79% in 2010.¹³⁰ The use of broadband in the home jumped from 5% to 64% during the same time.¹³¹ Less than 1% of adults connected wirelessly in 2000, compared to 58% in 2010.¹³² With such increases in the use of electronic resources, it is unsurprising that the Internet has readily been incorporated into politics and elections.¹³³

An initiative is “the process whereby citizens can adopt laws or amend [a] state constitution.”¹³⁴ In order to succeed in placing a direct initiative on the ballot in Utah, proponents must gather signatures equal to 10% of the total votes cast in the last gubernatorial election.¹³⁵ A direct initiative goes directly to the ballot, as opposed to an indirect initiative, which requires 5% of the total votes cast in the last gubernatorial election to be submitted to the Legislature for approval or rejection.¹³⁶

Popular referendum is the “process whereby citizens have the ability to send legislation passed by the legislature to a vote of the people to either accept or reject.”¹³⁷ A referendum also requires that proponents gather signatures equal to 10% of the total votes cast in the last gubernatorial election from around the state.¹³⁸

¹²⁷ *Case Resolutions*, AM. CIV. LIBERTIES UNION OF UTAH, <http://www.acluutah.org/resolutions.htm#anderson> (last visited Jan. 24, 2012).

¹²⁸ *See Utah Voters Defeat Measure to Create U.S. First Statewide School Voucher Program*, Foxnews.com (Nov. 7, 2007), <http://www.foxnews.com/story/0,2933,308936,00.html>.

¹²⁹ *See* Lee Rainie, *How Media Consumption Has Changed Since 2000*, PEW INTERNET & AM. LIFE PROJECT (June 2010), <http://www.slideshare.net/PewInternet/how-media-consumption-has-changed-since-2000>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See generally* KRISTEN A. FOOT & STEVEN M. SCHNEIDER, *WEB CAMPAIGNING: ACTING WITH TECHNOLOGY* (2006) (exploring how the use of the web in campaigns has developed over time, particularly since 2000); ANDREW PAUL WILLIAMS & JOHN C. TEDESCO, *THE INTERNET ELECTION: PERSPECTIVES ON THE WEB CAMPAIGN 2004* (2006) (discussing the increasing use and regulation of the web in elections between 2000 and 2004).

¹³⁴ *See* W. David Patton, *The Initiatives and Referendum Process in Utah*, POL’Y PERSPECTIVES (June 30, 2006), http://www.imakenews.com/cppa/e_article000594636.cfm?x=b11,0,w.

¹³⁵ UTAH CODE ANN. § 20A-7-201(2)(a)(i) (LexisNexis 2010).

¹³⁶ *Id.* § 20A-7-201(1).

¹³⁷ Patton, *supra* note 134.

¹³⁸ UTAH CODE ANN. § 20A-7-301(1)(a)(i).

The number of citizens engaging in direct democracy through initiatives and referenda is increasing in states that allow their use.¹³⁹ Access to technology is changing the way people become informed and involved in the political process, based largely on access to information and opinions on public policy.¹⁴⁰ The use of electronic signatures in election law increases the ability of a democratic society to engage its elected representatives and take part in crafting public policy. The most rewarding prospects of expanding the use of electronic signatures into other aspects of the election code would come from increased participation by the public in representing their own interests. For example, this could be done through a popular movement's formation into a new political party.¹⁴¹ The ease of signing an online petition for a particular cause would allow otherwise disenfranchised and poorly funded groups to come together and utilize the basic democratic tools available to the American citizenry.

The ability for a citizenry to use electronic signatures would dramatically increase access to initiatives and referenda.¹⁴² This will "make the will of the people law on issues that elected officials are unwilling to address."¹⁴³ These opportunities of direct democracy could also provide "an effective check on [the] perceived influence by special interest groups" on elected officials who "are particularly susceptible to special interests and their financial influence."¹⁴⁴

Thus, in the age of the Internet and blogosphere politics, the citizenry has more opportunities to ensure responsive representation. But when those elected officials fail to respond to the cries of the electorate, the people can harness the

¹³⁹ See *IRI Historical Database*, INITIATIVE & REFERENDUM INST. UNIV. S. CALIF. (Oct. 29, 2010), <http://www.iandrinstitute.org/data.htm> (providing a database of all statewide initiatives to appear on the ballot since the first statewide initiative in Oregon in 1904 through 2009).

¹⁴⁰ See generally RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM* (1999) (arguing that the same groups who dominated American politics in the past will continue to do so despite the rise of the Internet); DEMOCRACY.COM?: *GOVERNANCE IN A NETWORKED WORLD* (Elaine Kamarck & Joseph Nye eds., 1999) (collecting philosophical papers about the effect of the Internet revolution on politics); ANTHONY WILHELM, *DEMOCRACY IN THE DIGITAL AGE: CHALLENGES TO POLITICAL LIFE IN CYBERSPACE* (2000) (arguing that information-age technology may lead to the demise of necessary political deliberation and discourse). But see Philip Howard, *Can Technology Enhance Democracy? The Doubters' Answer*, 63 J. POL. 949 (2001) (reviewing Wilhelm, Kamarck and Nye, and Davis, and arguing that the Internet may improve democracy).

¹⁴¹ See, e.g., Sholto Byrnes, *Bizarre Political Parties: The Boston Tea Party*, NEW STATESMAN (Oct. 23, 2006), <http://www.newstatesman.com/node/154627> (discussing the formation of the Tea Party, which advocates libertarian solutions).

¹⁴² Note, however, that some commentators would argue that this would not necessarily be a good result for democracy. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 1–2 (2000).

¹⁴³ Patton, *supra* note 134.

¹⁴⁴ *Id.*

expanding use of innovation and technology through electronic signatures, in order to enact or repeal laws for their own self-governance.

The Utah Legislature should reconsider its post-*Anderson* reactionary legislation and allow for the expansion of electronic signatures in the Utah Election Code, once again making Utah a leader in embracing the legitimate and logical use of electronic signatures in the law.

V. CONCLUSION

Electronic signatures have become increasingly accepted in the law, but even so, validation and legitimacy come slowly. Congress and the various states have taken substantial steps to create uniform standards for electronic records and signatures through the passage of legislation like E-SIGN and UETA.¹⁴⁵

But as the Utah Supreme Court observed, there are other valid “transactions” in the law where these statutes should apply.¹⁴⁶ In *Anderson v. Bell*, it applied to an independent candidate’s ballot qualification.¹⁴⁷ The Utah Legislature disagreed, however, and amended the Utah Election Code to exclude electronic signatures.¹⁴⁸

This Note advocates expanding the reach of an electronic signature into other areas of election law. This includes instances involving qualifying independent candidates for the ballot; petitions to organize and register political parties; and qualifying ballot propositions such as recalls, initiatives, and referenda.¹⁴⁹ This expansion of electronic signatures would increase the involvement of the electorate through the efficiency, ease, and reliability associated with the use of electronic signatures in election law.¹⁵⁰ The use of electronic signatures in election law increases the ability of a democratic society to directly participate in crafting public policy and engage elected representatives.

The Utah Legislature should reconsider its actions and apply the UETA to the Utah Election Code as a logical and worthwhile expansion of electronic signatures in the law. The inevitable march of technology will carry on. Electronic signatures should not be limited to commercial and business transactions but should apply to election codes where a physical signature has traditionally been required. The Utah Legislature should reclaim Utah’s historic place as a leader¹⁵¹ of expanding the use of electronic signatures in the law.

¹⁴⁵ See *supra* text accompanying notes 14–44.

¹⁴⁶ See *supra* text accompanying notes 88–98.

¹⁴⁷ See *supra* text accompanying notes 99–100.

¹⁴⁸ See *supra* text accompanying notes 107–108.

¹⁴⁹ See *supra* text accompanying notes 127–138.

¹⁵⁰ See *supra* text accompanying notes 139–144.

¹⁵¹ See *supra* text accompanying notes 9–11.